UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMOKE HOUSE RESTAURANT, INC.

and

Cases 31-CA-26240
31-CA-26418
31-CA-26285

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, LOCAL 11, AFL-CIO

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ALJ'S FINDINGS OF FACTS AND CONCLUSIONS IN THE COMPLIANCE HEARING

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Now Comes Smoke House Restaurant, Inc., thought its representative, Leon Jenkins, and files the following Brief in Support of Its Exceptions to the ALJ's Findings of Fact and Conclusions in the Compliance Hearing (Supplemental Decision).

STATEMENT OF CASE

The compliance hearing in this matter was held on September 25-26, 2012, before Administrative Law Judge John J McCarrick. He rendered his Supplemental Decision on February 26, 2013.

The aforementioned compliance hearing was held pursuant to the May 12, 2009, order of United States Court of Appeals Ninth Circuit (unpublished) decision National Labor Relations Board v. JLL Restaurant, Inc. el al., Case No. 07-74755, NLRB Nos. 31-CA-26240, 31-CA-26418 and 31-CA-26285. Respondent Exhibit A. In its ruling the Court stated:

> "...we note that the Board... has established a compliance proceeding action to determine the ultimate amount of Smoke House's

financial liability under the "make-whole" order, and to align "make-whole" orders with Ninth Circuit law. See *Planned Building Services, Inc.*, 347 NLRB No. 64, 2006 WL 2206975 at *8-9 & n. 23 (citing *Advanced Stretchforming,* 233 F.3d at 1181-83; K*allman v. NLRB,* 640 F.2d 1094, 1102-03 (9th Cir. 1981). In that proceeding, Smoke House may present its arguments regarding whether the expired collective bargaining agreement's provisions regarding medical benefits had already been changed by JLL, whether Smoke House would have agreed to the terms of the previous collective bargaining agreement, and when it would have reached an agreement on new terms with the union or reached a bargaining impasse. [emphasis added]. Id at 4.

ISSUES AND DEFENSES RESPONDENT WAS NOT ALLOWED TO RAISE IN THE COMPLANCE HEARING

The directive from the Ninth Circuit Court of Appeal to the Board to *fashion its "make whole" orders with Ninth Circuit law," citing Planned Building Services, Inc.,* 347 NLRB No. 64, 2006 WL 2206975 at *8-9 & n. 23 (citing *Advanced Stretchforming,* 233 F.3d at 1181-83; K*allman v. NLRB,* 640 F.2d 1094, 1102-03 (9th Cir. 1981) for guidance was more than dictum. However, the ALJ downgraded the court's directive to the status of a footnote. ALJ decision at 9:25:30. The issues that the ALJ should have, but did not allow Respondent to litigate as part of its defenses were:

1. Whether the May 31, 2006 order of the NLRB, provision 2(b) requires Respondent to make retro-active premium payments to the Union Trustee Fund?

2. Whether Smoke House would have agreed to the terms of the previous collective bargaining agreement, and when it would have reached an agreement on new terms with the union, or reached a bargaining impasse?

3. Whether the expired collective bargaining agreement's (CBA) provisions regarding medical benefits had already been changed by JLL?

4. Whether JLL, Inc., and the Union had reached an impasse after the collective bargaining agreement had been terminated in September 2002?

5. Whether the Union Trustee Fund failure to provide healthcare benefits to JLL, Inc., and Smoke House employees from 2002-present resulted in any actual employees medical losses that the Union Trustee Fund is entitled to reimbursement?

6. Whether Respondent's employees have an interest in the future viability of the Trust Fund [Unite HERE Health], which is a healthcare plan only?

1. The Administrative Law Judge did not fashion his determination of the Board's "make whole" order consistent with the Ninth Circuit Court of Appeals decision in National Labor Relations Board v. JLL Restaurant, Inc. el al., Case No. 07-74755, NLRB Nos. 31-CA-26240, 31-CA-26418 and 31-CA-26285.

Stare decisis is the doctrine that demands adherence to judicial precedents and that requires that like facts be given like treatment in court of law. Meador v. Orys Energy Co., 87 F. Supp. 2d 658 (2001).

Law-of-the-case doctrine rests on a simple premise: The same issue presented a second time in the same case in the same court should lead to the same result. Kimberlin v. Quinlan, 199 F.3d 496, 339 U.S. App. D.C. 283, rehearing denied, rehearing en banc denied 207 F.3d 667, 340 U.S. App. D.C. 508, certiorari denied 121 531 US 871.

The ALJ's ruling that he does not have to follow Ninth Circuit law is overbroad as applicable to the instant case, because *San-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), *Planned Building Services, Inc., Advanced Stretchforming,* Kallman, *and others* are either United States Supreme Court, Ninth Circuit or Board cases that have followed Ninth Circuit law, or in the case of the Ninth Circuit decisions followed Supreme Court law.

Given the directive from the Ninth Circuit Court of Appeals to the Board, which was to *fashion its "make whole" orders consistent with Ninth Circuit law,"* the initial issue and element the General Counsel must have address was: Whether Smoke House

Restaurant employees have a future interest in the viability of HERE Health formerly known as Los Angeles Hotel-Restaurant Employer-Union Welfare Fund (Trust Fund)?

Though, there are other issues to be covered, this issue is discussed first because it is dispositive of the primary issue in this case. In the compliance hearing General Counsel and the charging party, not only failed and refused to present evidence that unit employees have a future interest in the viability of the Trust Fund, both admitted they did not have to produce evidence of the future viability of the Trust Fund. Tr. 39:17:25, 40:1:9, 26:24:25, 27:1:25, 28:1:24, 29:1:25, 30:1:13.

Further, it is undisputed that the Trust Fund is purely a healthcare plan. Respondent (R), Exhibit U. Given this undisputed lack of evidence, the following legal principles apply to the instant case.

The United States Supreme Court has stated that back-pay remedies must be tailored to expunge only actual, not speculative consequences of unfair labor practices. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984). Where an employee possess a non-economic interest in a union pension or health fund, ordering contributions to that fund on the employee's behalf is remedial, not punitive, because the contributions insures the viability of the funds necessary for the employee's future needs. *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.* 191 F3d 316, 324 (2 Cir. 1999).

Contributions to union funds are properly ordered where an employer's diversion of funds undercuts the ability of the plan to provide for future needs. *Stone Boat Yard v. NLRB,* 715 F2d 441, 446 (9th Cir. 1983), cert, denied 466 U.S. 937 (1984).

In the instant case, as in *Sedgwick Realty LLC*, 337 NLRB, 245, (2001), the issue confronting the ALJ is:

> *...whether individuals on whose behalf contributions to union funds have been ordered possess an economic interest in the future viability of those funds?* [Note, Respondent cannot over-emphasize that the Board in the instant case did not order it to pay any backpay premiums to the Health Funds].

Referencing back to *National Labor Relations Board v. JLL Restaurant, Inc. et al.*, the Ninth Circuit stated that the Board in the compliance hearing must *align "make-whole" orders with Ninth Circuit law, and Planned Building Services, Inc.*, 347 NLRB No. 64, 2006 WL 2206975 at *8-9 & n. 23, *Advanced Stretchforming*, 233 F.3d at 1181-83; K*allman v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981)

The General Counsel and charging party admissions, and the ALJ decision that neither General Counsel nor charging party had to offer evidence of the future viability of the Trust Fund ignored a crucial fact fatal to the General Counsel's and charging party's contention that Respondent is liable to pay retroactive payments in an amount over $1,200,000.00 to a health fund that future viability was not established to be vital to unit employees.

The ALJ now in his findings and conclusions attempts to cover up his erroneous decision by alluding to facts not in evidence, or in this record to show a scintilla of evidence that the employees have a future interest in the viability of the health plan. Under the ALJ findings and conclusions he found the mere existence of the health plan to be sufficient to support *"employees economic interest in the future viability of the fund."* Such a finding and conclusion is erroneous and not supported by established case law. *Sedgwick Realty LLC*, at 248, fn. 8 (2001), *Stone Boat Yard v. NLRB*, 715 F2d 441(1983).

Further, the ALJ's erroneously framed the issue herein to be the same as the issue in *Stone Boat Yard v. NLRB,* 715 F2d 441(1983), or *Grondorf, Field, Black & Co. v. NLRB,* 107 F3d 882 (D.C. Cir. 1997) as: *"...[W]hether individuals on whose behalf contributions to union funds have been* ***ordered*** *possess an economic interest in the future viability of those funds. On that issue, neither the* ***board*** *nor the* ***courts*** *(including the Ninth and D.C. Circuits) have ever held that fund contributions may be ordered in the absence of such an interest."* ... [emphasis added]. *Sedgwick Realty LLC,* at 248, fn. 8 (2001).

This is not the issue in the instant case, which makes this case even more distinguishable from *Kraft Plumbing and Heating Inc.*, 252 NLRB 891 (1980) and others, because the **Board** in the instant case **never ordered** reimbursements to the Union Trust Fund. See the following Section "A."

Additionally, unit employees must have a *future interest, and "a clear economic stake in the viability of funds to which part of their compensation [was] remitted. NLRB v. Harding Glass Co., Inc.,* 500 F.3d 1, 8 (1st Cir. 2007), quoting, *Manhattan Eye Ear & Throat Hosp.,* 300 NLRB, 201, 201-02 (1990), enforcement denied, 942 F2d 151 (2d Cir. 1991).

Where the plan is solely a health insurance plan, *not a pension plan* there is no issue of protecting the stability of such fund whose future viability the employees have no clear economic stake. *Lawrenceville Ready-Mix Co.*, 302 NLRB 1010, 1011, fn. 4. (1991).

The fundamental requirement that unit employees have an interest in the future viability in the Trust Fund at a minimal requires *"concrete evidence"* that the ordered

contributions are necessary to ensure future benefits to unit employees. *Centra Inc., 314 NLRB,* 814, 819-820 (1994).

A. The NLRB May 31, 2006 order does not mandate retroactive premium payments to the Trust Fund.

The primary tenet of judicial and administrative power to act is through its decisions, orders and judgments. If a judicial or administrative tribunal does not specify its directives in its decisions, orders or judgments, a party is not bound, or required to act outside of the order, decision or judgment. No-where in the Board's order does it specify that Respondent must make retroactive premium payments to the Trust Fund (Healthcare Fund).

The Board in the instant case never addressed, or made a finding or ruling/order that the Union Trustee Fund failure to provide healthcare benefits to JLL, Inc., and Smoke House employees from 2002-present resulted in actual employees medical losses that the Union Trustee Fund is entitled to reimbursement.

The Board order in the instant case is clear in its directive:

> *...retroactively restore the terms and conditions of employment of the employees in the unit as established by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral charges made thereto.* Board's Order and (Remedy). GC Exhibit 1(a), also See at 347 NLRB 192, 196-197, 208-209 (2006).

The instant case is distinguishable from *Kraft Plumbing and Heating Inc.*, 252 NLRB 891 (1980). In *Kraft,* the Board's order was clear, specific and undisputable, it required the employer to:

> 2(d) Make whole the employees in the appropriate unit by

> transmitting the contributions owed to the Union's health and welfare, pension, industry and apprenticeship funds pursuant to the terms of its collective-bargaining agreement with the Union,... id. at 891.

Kraft, as in all NLRB orders that required employers' retroactive contributions to a Fund explicitly and unequivocally spelled it out in their orders. For additional examples see *Stone Boat Yard v. NLRB*, 264 NLRB 981 (1983), *Stone Boat Yard v. NLRB,* 715 F2d 441, 443 (1983), *Ron Tirapelli Ford v. NLRB*, 304 NLRB 576, 580,581 (1991), *Carpenter Sprinkler Corp. v. NLRB*, 605 F2d 60, 64 (1979), *Harding 1*, 316 NLRB 985, 986, *Lawrenceville Ready-Mix Co.*,302 NLRB 1010, 1013, (1991).

There are no examples of the Board enforcing such sweeping affirmative retroactive contributions to a Fund without explicitly ordering an employer to do so, as found by the ALJ, 10:1:2? The reason the Board in the herein case did not explicitly order Respondent to make retroactive payments to the Trust Fund is because neither the ALJ, nor the Board made a determination that Respondent was obligated to pay retroactive healthcare premiums to the Trust Fund. GC Exhibit 1(a).

The ALJ confused the Board's language "to retroactively restore the terms and conditions of the CBA" to mean Respondent must then pay the Trust Fund back-pay premiums, this would only be true if unit employees suffered a loss. See the next part of same sentence "*...and make employees whole for any losses they incurred as a result of unilateral changes made thereto.*" Here the employees suffered no retroactive losses related to the Trust Fund other than out-of-pocket premium and medical payments they individually incurred.

Contrary to the ALJ findings, (ALJ 10:16:18) reinstatement of the healthcare plan required only a cumulative five months of per-employee, per-hour payments for

reinstatement. See Respondent's Exhibit P. "Hours [that] must be reported and contributions paid for five (5) months... for employees to be covered. Also see Respondent's Exhibit R, U, W, and OO-1.

The ALJ cites *Triple A Fire Protection, Inc.,* 357 NLRB No. 68 (2011) for the proposition that though the Board in the instant case did not explicitly order Respondent to make whole the Trust Fund, *Triple A Fire Protection, Inc* allows him to find that the Board implicitly made such an order. ALJ (10:1:5). *Triple A Fire Protection, Inc.,* does not state such a sweeping change of law, nor does it stand for such a proposition. *Triple A Fire Protection, Inc.,* involves a situation where the respondent failed to answer portions of the compliance specification, and respondent's defenses were stricken, including any defenses contesting backpay payments to the trust fund. *Triple A Fire Protection, Inc.,* 353 NLRB No. 88 (2009).

There was no need in *Triple A Fire Protection, Inc.,* to provide evidence of *"employees interest in the future viability of the fund,* because any defense respondent had against the Union was stricken. Notwithstanding, as in all cases where the Board ordered backpay to a trust fund as in *Triple A Fire Protection, Inc.,* it did so explicitly, and with specific language ordering respondent to do so. *Triple A Fire Protection, Inc.,* 315 NLRB 409 (1994). Also see *Triple A Fire Protection, Inc.,* 357 NLRB No. 68 (2011).

2. An impasse existed between Respondent and the Union. Further, the Union, Trust Fund and General Counsel impeded negotiations and fostered an environment where only an impasse was possible.

The Ninth Circuit Court of Appeals directive to the Board was clear, *fashion its "make whole" orders consistent with Ninth Circuit law" and the Board's ruling in Planned Building Services, Inc., Advanced Stretchforming,* and *Kallman v. NLRB.*

The principle of law explicit in *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006, *"...permit the Respondent, in a compliance proceeding to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals. If the Respondent carries its burden of proof on these points, the measure of the Respondent's make-whole obligation may be adjusted accordingly." Id. at 676.*

The principle of law expressed in *Kallman v. NLRB*, 640 F2d 1094, 1103 (9th Cir. 1981). An appropriate back-pay remedy cannot require an employer to pay a higher rate beyond a period allowing for a reasonable time of bargaining, and after a reasonable time the employer would only be required to pay at the rate it set.

Notwithstanding the legal principles stated in the instant case by the Ninth Circuit, in *Planned Building Services, Inc.*, and *Kallman v. NLRB*, and contrary to the ALJ statements in his decision that he "*allowed Respondent to present his defenses and evidence under Planned Building Services, Inc.,* pg. 13, fn. 29, *the record shows he*

disallowed any evidence of an impasse prior to May 1, 2003, (date Respondent took over the operations of the business, even though Respondent was held liable for the prior acts of its predecessors). Tr. 6, 34:11:25, 43:6:13, 46:15:25, 47:1:4. Spencer Tr. 218:9:25, 219:1:13.

The ALJ's claim that he followed the formula/elements in *Planned Building Services, Inc.,* is not support by the record, who in open court *off-the-record* confessed that he loath the decision. Thought the ruling in P*lanned Building Services, Inc.* to be ludicrous, and that he was not inclined to follow it. Even though, P*lanned Building Services, Inc,* follows principles set out in the U.S. Supreme Court case of *San-Tan, Inc. v. NLRB,* 467 U.S. 883, 902 (1984), "*...that the compliance hearing is the appropriate forum for adjudicating what would have occurred had lawful bargaining taken place.*" P*lanned Building Services, Inc,* at 676, fn. 25.

The ALJ's suggests in his findings and conclusions of law that he allowed Respondent to introduce into evidence facts consistent with *Planned Building Services, Inc., is not supported by the facts.* The ALJ did not allow Respondent to present any live testimony of impasse after May 1. 2003. Tr. 6:9:25, 7:1:25, 33:13:25, 34:1:25, 35:1:9, 43:6:13, 46:15:25, 47:1:4. Spencer Tr. 209:13:19, 217:25, 218:1:25, 219:1:13, R. Ex. F (rejected).

The limited evidence of impasse that was admitted into evidence was several letters that the parties stipulated to admit prior to Respondent putting on its case in chief. Tr. 198-201. Spencer's limited live testimony. Spencer Tr. 227:4:25, 228-229:1:12, 232:3:25, 233-234:1:3. 244:17:25, 245:1:3, 246, 247, 248:1:18, 249:3:6, 21:23, 250:8:14, 253:3:25, 256-260:1:6, 262:21:25, 263:1:6, 264:19:20, 265:6:12, 271:20:24, 272:23:25,

273:1:4, 275:21:23, 278:12:23, 283:24:25, 284-286:1:6, 288:14:19, 292:4:24, 293:19:25, 294:1:5, 294:18:25, 295-296:1:13,297:5:25, 298:1:16, 299:11:19.

The limited evidence admitted did show that the Trust Fund requested higher per hour, per employee rates than the Union contract allowed in violation of the agreement between the employer (Respondent) and the Trust Fund. The Trust Agreement for Los Angeles Hotel-Restaurant Employer-Union Welfare Fund provides in pertinent parts:

> Section 4.03(c)...The Trustees shall not accept contributions from any employer who fails to contribute in the amount required by this paragraph, *or who submits contributions where no appropriate contract calling for the payment of such contributions to this Fund exists,* or following date of impasse of negotiations after termination where such a contract had previously existed. GC Exhibit 2.

The Union, Trust Fund and General Counsel from the start of negotiations insisted, persisted, repeatedly, continually, harassingly and steadfastingly maintained that negotiations cannot start in good faith until Respondent make back-payment to the Trust Fund at a per hour, per employee rate of $2.90, which was two times higher than that required by the CBA contract rate of $1.43. R Exhibits U, OO-1. JT Exhibit 1, Attachment 8, Section 8, Tr. 288:14:19. 297:5:25, 298:1:16. Also see Tr. 282:2:16, 283:16:23, 224:22:25, 225:1:20, 234:1:7, 227:1:25, 228:1:16, 228:24:25, 229:1:25, 230:11:25, 232:1:25, 233:1:6, 261:12:25, 262:1:20, 233:13:25.

Even a causal reading of the CBA rejected the imposition of increase healthcare premiums rates without Respondent's affirmative approval. CBA Section 20 reads in pertinent parts:

> A. The Union agrees that in the event any contract or agreement is executed by the Union with any Employer of the same classification type of establishment located within the geographical jurisdiction of the Union, and said contract or agreement is more favorable in its provisions

> than any of the provisions of this Agreement, that then the Employer "*may*" have identical provisions inserted in this Agreement upon request and said provisions shall immediately become in full force and effect... [emphasis added]. JT Exhibit 1, Attachment 8, Section 20.

This per-hour, per unit employee rate required by the Union and Trust Fund spiraled upward each year and was made part of the total back-pay monies Respondent had to pay to the Trust Fund. GC Exhibit (d), Appendix A, Exhibit 1(g), Appendix A, Exhibit 1(s), Appendix A, Spencer Tr. 288:14:19. 297:5:25, 298:1:16; R. Exhibit U.

Notwithstanding the limited facts admitted into evidence, the undisputed facts made it clear the Union, Trust Fund, and General Counsel perpetuated a negotiation environment that could not succeed. See Respondent's Exhibit P. "Hours must be reported and contributions paid for five (5) months... for employees to be covered during the month of July 2007." Respondent's Exhibit R, letter and check, in the amount for $98,754.31 to reinstate employee healthcare plan. Respondent's Exhibit U, Trust Fund, now wanting $2.90 per hour, per unit employee refused to accept the aforementioned check. Also see Respondent's Exhibits W, OO-1, Spencer Tr. 288:14:19. 297:5:25, 298:1:16 where Union required payment at an unbargained for rate, and indicate there is an impasse, if Respondent does not pay the higher rate.

Notwithstanding, Respondent asked the Union to keep negotiating. R. Exhibit X. During all of 2006, the Union insisted before it would consider Respondent negotiating in good faith Respondent must provide the full remedy, including the unbargained for retroactive higher premium payments. R. Exhibit Y. The Union continued to echo the same unyielding position as it did in the earlier 2006 letters, and due to the Union failure to meet with Respondent, Respondent threaten impasse. R. Exhibit Z.

Going into 2007 the impasse continued See R. Exhibit AA, Respondent states: "we see no validity in the claim by the Union that meaningful negotiations, or no negotiations can take place until there in total compliance what the NLRB's decision and order. They are separate issues and instances that are mutually exclusive. If this continues to be the Union's position to not continue negotiations, then there is an impasse."

The Union had no intentions of restarting negotiations with Respondent even after the Ninth Circuit Court of Appeals issued its May 12, 2009 decision, which stated that as a condition to restart negotiations with Respondent the Union had to request Respondent to negotiate. GC Exhibit 1(c). The Board May 31, 2006 decision, GC Exhibit 1(a) states in pertinent parts:

> 2(a) On request, bargain with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

See Respondent's Exhibit BB, Letter to NLRB acknowledging that the Union as of July 8, 2009 had not made any attempt to contact Respondent to restart negotiations. Also see JT Exhibit 1, Attachment 2, Letter dated July 14, 2009, where the Union requested Respondent to begin good faith bargaining with it months after the Ninth Circuit decision, and only after Respondent notified the NLRB that the Union had not attempted to begin negotiations with it.

Attempts to negotiate thereafter were met with the same reframe from the Union, pay retroactive premium payments to the Trust Fund at the $2.90 rate, or there can be no negotiations. R. Exhibits CC, DD, EE, FF, GG, which created the same impasse that existed since 2004.

Since 2004 the Union, the Trust Fund and General Counsel took the position that "good faith" negotiations could not, and would not take place unless and until Respondent paid retroactive premium rates to the Trust Fund starting at $2.90, which escalated over time to $3.20. R. Exhibit U, OO-1, Spencer Tr. 288:14:19. 297:5:25, 298:1:16. GC Exhibit 1(d), Appendix A, Exhibit 1(g), Appendix A, Exhibit 1(s), Appendix A.

The Union, Trust Fund and the General Counsel stubbornly persisted and maintained this position notwithstanding numerous Ninth Circuit opinions contrary to their intrinsic position including *NLRB v. Advanced Stretchforming Intern. Inc.*, 233 Fed 1176, 1182 (9th Cir. 2000), which is factually on all fours with the herein case, and cited in the Ninth Circuit decision in the instant case, where the court held: "*...Though a successor may forfeit its right to set initial terms unilaterally when it engages in improper activities to evade the obligations of successorship, the successor has 'no obligation to accept his predecessor's labor agreement.' Kallman, 640 Fed at 1103. Consequently, when employees are awarded back pay running from the time the successor acquires the business until it finally bargains to an agreement or an impasse pursuant to a duty to bargain imposed after lengthy proceedings, employees may receive far more than they would have if the violation had never occurred" NLRB v. Advanced Stretchforming Intern. Inc.*, at 1182.

The Union, Trust Fund and General Counsel did not reverse their unreasonable and untenable position requiring escalating premium payments for the Trust Fund until the day of the Compliance Hearing, September 25, 2012. GC Exhibit 11, Appendix A.

Also see testimony of compliance officer Danielle Pierce, D. Pierce Tr. 148:3:8, 148:13:21. Nichole Pereira Tr. 10, 13:12:25, 14:1:14.

The Union, Trust Fund and General Counsel dogged pursuit of rate increases not supported by law, or contract (CBA), or reason was a gross interference with Respondent's attempt to reach an agreement with the Union, and totally foiled any reasonable attempt of negotiating an agreement leaving the only reasonable option to be that of an impasse. The Union's refusal to continue bargaining with Respondent cannot fairly be said to effectuate the policies of the Act. *Virginia Electric & Power co., v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218 (1943), and the ALJ's finding to the contrary is in error, and not supported by substantial facts contained in this record.

3. As a matter of law the enforcement of a "make whole" remedy beyond the termination date of the collective bargaining agreement is punitive and cannot be enforced.

Any "make whole" remedy, which subjects an employer to continuing liability beyond the termination date of the collective bargaining agreement is punitive and unenforceable. *Rayner v. NLRB*, 665 F2d 970, 976 (1982). In the instant case, Respondent liability as a successor corporation under the prior collective bargaining agreement between JLL, Inc., and the Union terminated one year from its renewal date of September 15, 2002. JT Exhibit 1, Attachment 8, Sec. 22, RA 38. See, *NLRB v. Advanced Stretchforming Intern. Inc.*, 233 Fed 1176, 1182 (9th Cir. 2000).

General Counsel in this compliance hearing advocated precisely what the Ninth Circuit said it could not do, which is to enforce a "make whole" remedy far beyond the termination date of the predecessor corporation (JLL, Inc.) and the Union collective

bargaining agreement, which terminated on September 15, 2002, and any extension would likewise terminate one year later on September 15, 2003.

This principle of law was expressed earlier in Ninth Circuit opinions in *Kallman v. NLRB*, 640 F2d 1094, (9th Cir. 1981), and *NLRB v. Dent*, 534 F2d 844 (9th Cir. 1976) where they faced the same issue as in this compliance hearing. "...After a reasonable period for bargaining [Respondent] would be required to pay only at a rate [it] set." *Kallman,* at 1103. The Board "make whole" remedy, which included a backpay remedy that ran three and half years longer than the CBA agreement is punitive. *Dent*, at 846-847, *Kallman*, at 1103. Respondent's liability, if any, should be limited from the date of purchase and operations May 1, 2003 to the termination date of the collective bargaining agreement on September 15, 2003.

A decision by the ALJ to compel a much longer unbargained for healthcare premium payments would amount to a direct and impermissible governmental intervention into the collective bargaining negotiations of Respondent and the Union, which is outside the scope of the NLRB's power. *Porter Co. v. NLRB*, 397 U.S. 99, 104-106, 109 (1969). The Board "...is without the power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." Id. at 102.

4. The ALJ erred in granting Unite HERE Health, and Unite HERE Local 11 Petition to Revoke Respondent's Subpoena Duces Tecum.

The ALJ decision granting Unite HERE Health, and Unite HERE Local II Petition to Revoke Respondent's Subpeona Duces Tecum was contrary to the May 31, 2009 court decision that Respondent be allowed to present evidence of whether its

predecessor had changed the CBA, or reached an impasse, or whether Respondent would have after bargaining in good faith reach an agreement with the Union, or bargained to an impasse.

The ALJ's decision granting Unite HERE Health, and Unite HERE Local 11 Petition to Revoke Respondent's Subpoena Duces Tecum barred Respondent from obtaining vital evidence related to the issues the Ninth Circuit Court of Appeals (unpublished) decision in *National Labor Relations Board v. JLL Restaurant, Inc. el al.*, Case No. 07-74755, NLRB Nos. 31-CA-26240, 31-CA-26418 and 31-CA-26285. General Counsel (GC) Exhibit 1(c), stated Respondent could litigate in the compliance hearing consistent with *Planned Building Services, Inc.*, 347 NLRB No. 64, 2006 WL 2206975 at *8-9 & n. 23, *Advanced Stretchforming*, 233 F.3d at 1181-83, and *Kallman v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981). Also see Tr. 29:1:25, 30:1:13, 26:24:25, 27:1:25, 28:1:24, Respondent Exhibit QQ.

5. The ALJ failure to rule on Respondent's Motion to Introduce Evidence of JLL., Inc. Modification of CBA with HERE, Local 11 was an abuse of discretion, which resulted in the exclusion of any evidence concerning the CBA between the parties.

"There no evidence that neither party gave notice to terminate the collective-bargaining agreement," (ALJ 3:29:30), that is because the ALJ would not allow Respondent to present evidence of notice to terminate the CBA by JLL, Inc. Respondent Exhibit, KK. The ALJ barred Respondent from presenting in the compliance hearing admissible evidence related to the issues the Ninth Circuit Court of Appeals (unpublished) decision in *National Labor Relations Board v. JLL Restaurant, Inc. el al.*,

Case No. 07-74755, NLRB Nos. 31-CA-26240, 31-CA-26418 and 31-CA-26285. General Counsel (GC) Exhibit 1(c), stated Respondent could litigate in the compliance hearing consistent with *Planned Building Services, Inc.*, 347 NLRB No. 64, 2006 WL 2206975 at *8-9 & n. 23, *Advanced Stretchforming*, 233 F.3d at 1181-83, and *Kallman v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981). Also see Tr. 33:13:25, 34:1:25, 35:1:9, 46:15:25, 47:1:4, 196:9:25, 197:1:20.

6. The ALJ abused his discretion when he failed to allow Respondent to introduce physical and testimonial evidence concerning the financial health of Respondent from May 2003 to October 2003, as evidence of what Respondent could realistically monetarily afford to pay employees in a new CBA.

The ALJ erred in denying Respondent the opportunity to present evidence of the financial status of Smoke House Restaurant during relevant periods of negotiations with the Union for a new CBA. The financial status of Respondent goes to the issue of good faith negotiations, and realistically how much Respondent could afford to agree to in a new CBA. ALJ (14:31:38). Contrary to the ALJ statements in his findings and conclusions (14:31:38), the P & L was for the six months period from May 2003 to December 2003, not 2009. See Respondent's (rejected) Exhibits PP, MM. Tr. 244:17:25, 245:1:2, 246:2:25, 247:1:25, 248:1:14, 260:19:25, 261:1:10.

Evidence of the financial status of Respondent is relevant to show good faith limitations to what Respondent could financially agree to accept in any wage and benefit employee package in a new CBA, or whether the parties would have reached an impasse.

7. General Counsel failed to meet its burden of proof as to the accurate calculations of unit employees and individual employees' actual medical costs and premium payments, and the ALJ findings and conclusions is not support by substantial facts.

The compliance officer for the NLRB was the only witness to offer testimony and evidence of unit employees' actual premium and medical costs incurred by each employee. However, the data and information used to calculate individual unit employees' actual expenditures were flawed, and boiled down to no more that guessing which plan each unit employee belonged. A determination depending on the plan chosen by the employee could significantly affect the employee's medical expenditures.

The Trust Fund contained four (4) different healthcare plans, and they differed significantly as to coverage, premiums and out of pocket employees costs. Tr. D. Pierce 157:2:8. For example, under the indemnity plan it could cover as little as 50% of an employee's medical costs. JT Exhibit 1, Attachment 7A. Employees' annual deductions could be in the hundred of dollars JT Exhibit 1, Attachment 7A.

The compliance officer could not, and did not say for certainty, whether there were no required employee contributions for any of the four plans. Pierce Tr. 154:14:25. The compliance officer testified that there were four (4) plans and "I chose the plan that [in my opinion] most favored the employees." D. Pierce Tr. 157.

Despite the fact that all of the affected unit employees were readily available to provide information as to which healthcare plan they participated in. NLRB Rules and Regulations, Sec. 102.39 states in pertinent parts:

> *Any such proceeding shall, so far as practicable, be conducted*
> *In accordance with the rules of evidence applicable in the district*

Courts of the United States...

Federal Rules of Evidence, Rule 1002 (best evidence rule) requires the original of a document, where the contents of documents are sought to be proved. Here the summary calculations by the compliance officer were flawed, because it did not contain the information as to which plan unit employees were covered under, the differences between each plan, or the differences in medical costs in each plan.

This is the classic case where the party with the burden of proof failed to produce evidence in its possession. General Counsel offered only speculative evidence of possible losses by unit employees. GC Exhibit 12. The United States Supreme Court in Sure-Tan, Inc, v. NLRB, 467 U.S. 883, 900 (1984) made it clear that: "*...Board's remedies must compensate for actual injuries suffered by the employees rather that speculative consequences of unfair labor practices.*"

Given the compliance officer's testimony that she, and she along determined which method and information to use in determining unit employees actual losses, while disregarding facts that would accurately reflect unit employees losses, makes General Counsel's calculation meaningless in the determination of the actual medical losses incurred by each unit employee. Tr. 157:1:16, 158:2:13, 153:4:25, 154:1:17, 70:6:25, 71:1:10, 187:13:25, 188:1:8, 189:3:5. The ALJ findings and conclusions were in error and based on speculative and erroneous facts.

A. Likewise General Counsel failed to sustain it burden of proof concerning the individual medical expense claims of Lynn Pearson and her daughter.

Lynn Pearson was the only employee to testify about her alleged actual medical losses. However, she failed to provide any documentary evidence of payments (best

evidence rule), or evidence of present outstanding medical debt. Failed to produce evidence in her possession and/or control (proof of payment). Failed to provide evidence that her workers compensation claim from 2004-2007 did not cover her medical losses, coupled with the ALJ prohibition against allowing Respondent to pursue this evidence. Pearson failed to provide evidence that her Mold case settlement did not cover her medical losses from 2004-2007, again the ALJ prohibited Respondent from pursuing this evidence.

Nor, did the witness or General Counsel provide any doctor(s), or other medical expert(s), or admissible medical documentary evidence to show that her daughter, who reached the age of 19 in 2004, was physically or mentally disabled prior to 2007. Finally, the ALJ erred in admitting the drug summaries into evidence.

The issue here is not the standard for review for judging the creditability of witnesses, but whether the ALJ decision can be affirmed where no evidence exist to support his findings and conclusions.

Taking Pearson evidence in the aforementioned order set out above, Pearson produced at the compliance hearing prescription drug lists covering several years between 2004-2009 for prescriptions for herself and her adult daughter. GC Exhibits 5-6.). Under the Trust Fund policy any child after age 18 could only remain on a parent's policy if they are disabled. JT Exhibit 1, Attachment 7A, Sec. 4, pg 8 and 19.

Neither Pearson nor General Counsel produced any medical evidence that Pearson's daughter was physically or mentally disabled. Tr. 82:7:25, 83:1:25, 84:1:25, 85:1:8, 194:6:16. The only evidence on the subject matter came from Pearson, who offered conclusory hearsay statements as to her daughter's disability. Pearson Tr. 81-86.

The testimony was objected to by Respondent, and should have been excluded under FRE, Rules 701, a lay person may not testify as an expert, or give an opinion based on scientific, technical or specialized knowledge. Federal Rule of Evidence, Rule 602 a lay witness may only testify as to things within their personal knowledge. Federal Rule of Evidence, Rule, 801 an out of court statement to prove the truth of the matter asserted is hearsay. Repeating expert statements are hearsay statements. However, Pearson did not in her testimony repeat what medical experts may have told her, or for that matter, whether she had ever personally spoken to a doctor, or medical experts about her daughter. Pearson Tr. 81-86.

Pearson also gave speculative, incomplete and confusing testimony about two (2) healthcare plans her daughter was covered under from 2004-2007. Pearson Tr. 79-80:1;17. One was a plan she had for her daughter prior to her employment with Respondent, and the other was the Trust Fund plan. Pearson Tr. 79:25, 80:1:18.

Pearson claim loss of monies paid for premium/medical expenses, but failed to produce any receipts of payments. Pearson Tr. 126:13:16. D. Pierce Tr. 185;13:16. Pearson claimed over $9,000.00 for medical expenses for hundreds of drug prescriptions over a four year period, but did not, or could not, produce a single document evidencing payment in any form, i.e., cancel checks, debit statements, or physical receipts. Pearson Tr. 126:13:16, D. Pierce Tr. 185:13:16. GC Exhibits 5, 6.

Under the Trust Fund plan workers compensation injuries are not covered, however General Counsel did not produce any evidence that the medical claims of Pearson were within policy. JT Exhibit 1, Attachment 7A. Nor did General Counsel provide evidence that Pearson medical claims were not already provided for under her

workers compensation settlement. Tr. Pearson 113:20:25, 114:13:25, 115, 116:1:8, 117:8:11.

There was also Pearson and her daughter's Mold case settlement, which covered medical expenses during the relevant period from 2004-2007. Notwithstanding, Pearson did not offer any evidence as to what medical expenses of hers or her daughter were covered by the Mold settlement. Pearson Tr. 120:23:25, 121-124, *"...a remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, Inc, v. NLRB*, 467 U.S. 883, 900 (1984).

Further, because the compliance officer guessed at which health plan unit employees had, and each plan had significant differences the ALJ has no way of knowing, other than guessing, as the compliance officer did, what amount, if any, Pearson or her daughter were entitled to recover as actual medical expenses that are verified by this record. Pierce Tr. 187:13:15.

Pearson could not remember whether she was under the Indemnity Plan or Kaiser plan or both at sometime or another. 187:16:24. Notwithstanding, the compliance officer did not make allowances in her calculations for the significant differences in the plans. Pierce Tr. 187:25, 188:1:13. For example, one of the significant differences in the Indemnity plan is that it provided for only a 60 days supply of drugs. JT Exhibit 1, Attachment 7A, and may pay as little as 50% of medical cost. JT Exhibit 1, Attachment 7A. Annual deductions under the Indemnity plan are in the hundred of dollars. JT Exhibit 1, Attachment 7A.

General Counsel bears the burden of proof to prove actual damages suffered by Pearson and other unit employees, and the method and information use by the compliance

officer is lacking in accuracy, or is not applicable in this case, and/or misleading, not trustworthy, and speculative.

B. The ALJ erred in the admission of the prescription drug summaries concerning the individual medical expense claims of Lynn Pearson and her daughter.

The ALJ admission of the prescription drug summaries of Pearson and her daughter were errors, because the summaries and/or the documents to support the summaries were not authenticated, were hearsay evidence, and the accuracy of the information was not verified. GC Exhibits 5-6, Tr. 106:6:25, 107:1:2. Federal Rules of Evidence, Section 902(11) requires the certification of documents as to their verification and accuracy by a custodian of records, or another qualified person that complies with a federal statute, or a rule prescribed by the Supreme Court.

In the instant case, Person appeared in court with several hundred pages of paper with numerous medical terms, numbers and medical codes that she could not interpret. The ALJ admitted the bundle of papers as official documents from two drug stores without certification from the custodian of records as required by FRE, Sections 902 (11), 1001, 1002. Nor, was the limited testimony of compliance officer Danielle Pierce, or Pearson, or the wrongfully admitted documents were exceptions to any hearsay rule. Federal Rule of Evidence, Rule, 801

C. The ALJ erred in omitting evidence of payments received by Pearson and her daughter in their Mold case settlement for medical expenses and care during the relevant period not covered by Respondent.

The ALJ erred in not allowing Respondent to present evidence of payments in the mold case that Pearson and her daughter settled included payments for medical care and expenses claimed in the instant case from 2004-2007. Tr. 120:23:25, 121:1:25, 123:1:25, 124:1:18, 132:6:11, 127:1:7, 127:8:25, 128:1:25, 129:1:22. Evidence of the payment for drugs from other sources is admissible to prove the employee suffered no out-of-pocket losses.

D. The ALJ erred in disregarding evidence of payments received in Pearson's Workers Compensation settlement for medical care and expenses during the relevant period not covered by Respondent.

The ALJ failed to consider evidence of payments, and/or allow Respondent to pursue additional evidence in the workers compensation case that Pearson's settlement included payment for medical care and expenses claimed in the instant case from 2004-2007. Tr. 116:2:25. Evidence of payment for drugs from other sources is admissible to prove the employee suffered no out-of-pocket losses.

CONCLUSION:

The "make whole" remedy rendered by the ALJ was not fashion consistent with the Court's ruling in this matter, using principles established in *Planned Building Services, Inc.,* 347 NLRB 670, 710 (2006), *Advanced Stretchforming,* 233 F.3d at 1181-83, K*allman v. NLRB,* 640 F.2d 1094, 1102-03 (9th Cir. 1981). Applying the facts to the aforementioned principles of law supports the following conclusions: That an impasse

existed between Respondent and the Union. Further, the Union, Trust Fund and General Counsel impeded negotiations and fostered an environment where only an impasse was possible.

The Board's May 31, 2006 order did not mandate retroactive premium payments to the Trust Fund. As a matter of law the enforcement of a "make whole" remedy beyond the termination date of the collective bargaining agreement in this instant is punitive and will not be enforced.

The ALJ erred in his decision granting Unite HERE Health, and Unite HERE Local 11 Petition to Revoke Respondent's Subpoena Duces Tecum.

The ALJ failure to rule on Respondent's Motion to Introduce Evidence of JLL., Inc. Modification of CBA with HERE, Local 11 was an abuse of discretion, which resulted in the exclusion of evidence concerning the termination and changes in the CBA between the parties.

The ALJ abused his discretion when he failed to allow Respondent to introduce physical and testimonial evidence as to the financial health of Respondent from May 2003 to October 2003, as evidence of what Respondent could realistically monetarily afford to pay employees in a new CBA.

General Counsel has failed to meet its burden of proof as to the Trust Fund and each unit employees' actual medical and premium losses, which included the individual alleged medical losses of Pearson and her daughter. The proofs represented in the compliance hearing were speculative, i.e., the Trust Fund provided four (4) health plans for its members. The compliance officer only provided data and information on one plan,

though significant difference exists between the plans, which greatly affected the Trust Fund and employees claimed medical losses.

Pearson claimed over $9,000.00 in medical losses for her and her grown daughter, but offered no documents or receipts of losses. Nor, did Pearson or General Counsel offer doctor(s) or medical expert(s) testimony, or medical records of evidence that her daughter was physically disabled during the period from 2004-2007. Neither Pearson nor General Counsel offered evidence that her workers compensation claim did not cover her medical expenses from 2004-2007, and the ALJ refused to allow Respondent to offer evidence of duplicate payments of her claim.

Pearson nor General Counsel offered any evidence that Pearson and her daughter's mold case settlement did not cover both of their medical expenses claimed from 2004-2007, and the ALJ refused to allow Respondent to offer evidence of duplicate payments of their claims.

The party claiming damages has the burden to prove actual damages. *"...a remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Sure-Tan, Inc, v. NLRB*, 467 U.S. 883, 900 (1984).

RELIEF REQUESTED:

WHEREFORE, Respondent requests the Board to reverse the findings and conclusions of the ALJ, and to make findings of law and fact that the General Counsel has not met its burden of proof, that unit employees have an interest in the future viability of Trust Fund. The Union and Trust Fund frustrated and impeded the negotiations for a new CBA between the parties by insisting that Respondent pay higher retroactive

premium contributions to the Union Trust Fund that were not mandated in the CBA, the Board's order, or law.

The General Counsel proofs of Trust Fund contributions owed by Respondent were speculative. The General Counsel proofs of individual unit employees' medical losses were speculative.

The Board's order does not include in its "make whole" remedy any directive to make retroactive premium payments to the Trust Fund, nor is the Trust Fund entitled to any retroactive premium payments. Respondent has no liability to the Union, its unit employees, or the Trust Fund after the termination date of the CBA between the Union and Respondent on September 15, 2003.

Respondent would have reached an impasse in the summer of 2003 or 2004 because of the Union improper conduct during the negotiations.

Further, an interpretation of the Board's "make whole" order to include retroactive premiums to the Trust Fund would be punitive and a penalty, and will not be granted.

WHEREFORE, Respondent requests the Board to deny enforcement of the "make whole" remedy as to the Trustee Fund, and limit liability to unit employees to the date of impasse, or date the collective bargaining agreement terminated between JLL, Inc., and the Union on September 15, 2003.

Date: 3/20/13

Leon Jenkins, Representative
For Smoke House Restaurant,
Inc., 4420 Lakeside Drive,
Burbank, Ca. 91505
310-904-8371

CERTIFICATION OF SERVICE

STATE OF CALIFORIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am not a party in the within action, and I hereby declare that on March 20, 2013, I served the foregoing documents described as RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION and RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ALJ'S FINDINGS OF FACTS AND CONCLUSIONS IN THE COMPLIANCE HEARING, on:

Mori Pam Rubin, Region Director, Region 31, National Labor Relations Board, and Nicole Pereira, Esq. at 11150 W. Olympic Blvd., Suite 700, Los Angeles, Ca. 90064-1824, Ellen Greenstone, Esq., and Kirill Penteshin, Esq., Rothner, Segall, Greenstone, 510 South Marengo Ave., Pasadena, Ca. 91101-3115, H.E.R.E. Local 11, 464 S. Lucas Ave., Suite 201, Los Angeles, Ca. 90017, and Henry Willis, Esq., Schwartz, Steinsapir, Dohrmann & Sommers 6300 Wilshire Blvd., Ste. 2000, Los Angeles, Ca. 90048 by mail.

I deposit such envelope in the United States Mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dismas Linton Thomas

Declarant